

**ST 04-1**

**Tax Type: Sales Tax**

**Issue: Responsible Corporate Officer – Failure to File or Pay Tax**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS**

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<b>THE DEPARTMENT OF REVENUE</b>	)	
<b>OF THE STATE OF ILLINOIS</b>	)	
	)	<b>Docket No. 01-ST-0000</b>
<b>v.</b>	)	<b>IBT # 0000-0000</b>
	)	<b>NPL # 0000</b>
<b>JOHN DOE</b>	)	
	)	
<b>Respondent</b>	)	

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Sean M. Anderson of Sutkowski & Rhoads, Ltd. for JOHN DOE.

Synopsis:

The Department of Revenue ("Department") issued a Notice of Penalty Liability ("NPL") to JOHN DOE ("respondent") pursuant to section 13½ of the Retailers' Occupation Tax Act ("ROTA") (Ill.Rev.Stat. 1985, ch. 120, par. 452½) and section 3-7 of the Uniform Penalty and Interest Act ("UPIA") (35 ILCS 735/3-7)<sup>1</sup>. The NPL alleges that the respondent was an officer or employee of ABC Company, Inc. ("corporation") who was responsible for willfully failing to pay the corporation's retailers' occupation taxes ("ROT"). The respondent timely protested the NPL, and an evidentiary hearing

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<sup>1</sup> Section 3-7 of the UPIA became effective January 1, 1994.

was held. During the hearing the respondent argued that the corporation is still in existence and has income, and therefore the Department must collect the liability from the corporation and not the respondent. The respondent also argued that he was not responsible for paying the taxes, or for wilfully failing to do so. After reviewing the record, it is recommended that the liability be affirmed.

Findings of Fact:

1. From 1986 to 1996, the corporation was in the business of selling, repairing and servicing industrial scales. (Tr. p. 9)

2. From 1986 to 1996, the respondent was the president of the corporation, and he was responsible for managing the construction site of the business. He prepared the quotes for jobs and made sure that the jobs were being done. (Tr. pp. 10, 13)

3. The respondent's father started the corporation, and when his father died in 1981, the respondent became aware that the corporation was in arrears with its ROT liability. (Tr. pp. 17-18)

4. The respondent and his two siblings, who were the other officers of the corporation, made the decisions concerning the payment of the corporation's liabilities. (Tr. pp. 17-23)

5. On July 16, 2001, the Department issued NPL number 7558 to the respondent that proposed a total penalty liability of \$783,924.15, including tax, interest, and penalty, for failure to pay ROT on an annual basis from July 1987 through July 1996. The NPL was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1).

Conclusions of Law:

Section 13½ of the Retailers' Occupation Tax Act provides in part as follows:

"Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who wilfully fails to file such return or to

make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax evaded, including interest and penalties thereon;" Ill.Rev.Stat. 1985, ch. 120, par. 452½ (now 35 ILCS 735/3-7(a))<sup>2</sup>.

An officer or employee of a corporation may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the ROT returns and paying the taxes, and (2) the individual wilfully failed to perform these duties.

The Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due. Branson v. Department of Revenue, 168 Ill.2d 247, 260 (1995). Once the Department presents its *prima facie* case, the burden shifts to the respondent to establish that one or more of the elements of the penalty are lacking, i.e., that the person charged was not the responsible corporate officer or employee, or that the person's actions were not wilful. Id. at 261. In order to overcome the Department's *prima facie* case, the allegedly responsible person must present more than his or her testimony denying the accuracy of the Department's assessment. A. R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 833-34 (1st Dist. 1988). The person must present evidence that is consistent, probable, and identified with the respondent's books and records to support the claim. Id.

In the present case, the Department's *prima facie* case was established when the Department's certified record relating to the penalty liability was admitted into evidence. In response, the respondent first argues that the Department cannot collect the liability from the respondent because the corporation has not been dissolved and currently has

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<sup>2</sup> The following is the relevant part of section 3-7 of the UPIA: "Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon." (35 ILCS 735/3-7(a)).

income. The respondent cites the case Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19 (1985), where the court stated as follows:

“Only where the corporation has incurred retailers’ occupation tax liability and is unable to pay such amounts to the Department may personal liability attach to a responsible officer or employee who has wilfully failed to file retailers’ occupation tax returns or pay retailers’ occupation taxes.” Heartland at 32.

The respondent contends that according to this provision, it must first be found that the corporation is unable to pay the retailers’ occupation tax assessed against it before personal liability may attach to an officer or employee under section 13½. The respondent notes that this same provision was quoted by the court in McLean v. Department of Revenue, 326 Ill.App.3d 667 (1<sup>st</sup> Dist. 2001).

The respondent testified that the corporation against which the liability was assessed is still in existence and still has income. He stated that it has not been dissolved, and its income is from leases. The corporation leases some of its vehicles and machines to ABC & Equipment Company, Inc., which is another corporation that the respondent and his siblings own and operate. Other than the vehicles that are being leased to ABC & Equipment Company, Inc., the remaining vehicles that the corporation owns are not being used. The corporation does not own any other equipment. (Tr. pp. 12-13)

The provision from Heartland cited by the respondent is not relevant to the present case because the Heartland court was applying a version of the statute that is different than the one that is applicable in the present case. Courts must apply the version of the statute that was in effect at the time the tax was incurred. Sweis v. Sweet, 269 Ill.App.3d 1, 12 (1<sup>st</sup> Dist. 1995). The following version of section 13½ is the one that applied in Heartland:

“Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance

with Section 3 of this Act and who wilfully fails to file such return or to make such payment to the Department shall be personally liable for such amounts, including interest and penalties thereon, **in the event that after proper proceedings for the collection of such amounts, as provided in said Act, such corporation is unable to pay such amounts to the department;**” Ill.Rev.Stat. 1979, ch. 120, par. 452½ (emphasis added).

As the highlighted section indicates, the statute required a finding that the corporation was unable to pay the liability before an officer or employee could be held personally liable. The Heartland court’s statement that personal liability may attach only when the corporation is unable to pay the liability is based on this requirement in the statute. This clause of the statute, however, was omitted from section 13½ effective September 13, 1984. See Ill.Rev.Stat. 1985, ch. 120, par. 452½. The versions of section 13½ that apply to the present case do not contain this language. Nothing in these provisions restricts the Department’s ability to collect the penalty only when the corporation is unable to pay its taxes.<sup>3</sup> Therefore, a finding that the corporation has the ability to pay the taxes does not warrant dismissal of the NPL.<sup>4</sup>

The question that must be decided in this case is whether the respondent was actually an officer who was responsible for filing and paying the ROT and wilfully failed to do it. For guidance in determining whether a person is responsible under section 3-7 the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (26 U.S.C. §6672)<sup>5</sup>. See Branson at 254-56; Heartland at 29-30. These cases state that the critical factor in determining responsibility is whether the person had significant control over the corporation's finances. See Purdy Co. of Illinois v. United States, 814 F.2d 1183, 1186 (7th Cir. 1987). Responsibility is generally found in high corporate officials who have control over the corporation's business affairs and who

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<sup>3</sup> There is nothing in the record concerning why the corporation’s ROT obligations have not been paid for approximately 10 years if the corporation has the ability to pay them.

<sup>4</sup> In McLean, the applicable statute was Ill.Rev.Stat. 1991, ch. 120, par. 452½, which did not contain the language concerning the corporation’s inability to pay. When the McLean court cited Heartland, it was simply reviewing general rules governing the penalty liability. The question of whether a corporation’s ability to pay the debt should affect the imposition of the penalty was not an issue in McLean.

<sup>5</sup> This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

participate in decisions concerning the payment of creditors and the dispersal of funds. Monday v. United States, 421 F.2d 1210, 1214-1215 (7th Cir. 1970), cert. den. 400 U.S. 821.

In addition, these cases define "wilfull" as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious known risks. See Branson at 254-56; Heartland at 29-30. Wilfull conduct does not require bad purpose or intent to defraud the government. Branson at 255; Heartland at 30. Willfulness may be established by showing that the responsible person (1) clearly ought to have known that (2) there was a grave risk that the taxes were not being paid and (3) the person was in a position to find out for certain very easily. Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987). Furthermore, whether the person in question wilfully failed to pay the taxes is an issue of fact to be determined on the basis of the evidence in each particular case. Heartland at 30; Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568, 577 (1977). Courts have found that giving preferential treatment to other creditors rather than paying the corporation's taxes constitutes wilfull behavior. See Heartland at 29-30.

The evidence in this case supports a finding that the respondent was a responsible person who willfully failed to pay the tax liability. First, the only evidence presented by the respondent was his oral testimony, which is not sufficient to overcome the Department's *prima facie* case. A.R. Barnes & Co., supra. According to the respondent, his testimony indicating that the corporation has income and that he was not a responsible officer was sufficient to rebut the *prima facie* case of the Department. The respondent refers to the following excerpt:

“[A] rebuttable presumption may create a *prima facie* case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption. However, once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is

determined on the basis of the evidence adduced at trial as if no presumption had ever existed. [citation omitted] The burden of proof thus does not shift but remains with the party who initially had the benefit of the presumption.” Franciscan Sisters Health Care Corporation v. Dean, 95 Ill.2d 452, 460-61 (1983).

The respondent argues that the Department’s *prima facie* case disappeared once he produced his oral testimony to rebut it. Therefore, he contends that the NPL should be dismissed.

Courts that have decided ROT cases have consistently held that a taxpayer may not overcome the Department’s *prima facie* case with only the taxpayer’s oral testimony. A.R. Barnes & Co. at 835; Sprague v. Johnson, 195 Ill.App.3d 798, 804 (4th Dist. 1990); Elkay Manufacturing Company v. Sweet, 202 Ill.App.3d 466, 472 (1<sup>st</sup> Dist. 1990); Vitale v. Department of Revenue, 118 Ill.App.3d 210, 213 (3<sup>rd</sup> Dist. 1983). To prove his case, a taxpayer must present more than his testimony denying the Department’s assessment. Id. The taxpayer must present sufficient documentary evidence, identified with his books and records, to support his claim. Id.

The respondent did not provide any evidence to support his oral testimony. Even if the corporation’s ability to pay the tax were relevant, the respondent did not present any documentary evidence (such as financial statements or general ledger) to support a finding that the corporation is currently making money. The respondent did not present any corroborating evidence that he was not responsible for paying the tax and wilfully failed to do so. Without any evidence to supplement his oral testimony, it cannot be found that the respondent has overcome the *prima facie* case.

In addition, the respondent’s testimony supports a finding that he was a responsible officer who wilfully failed to pay the tax. The respondent testified that he was the president of the corporation, and he participated in decisions concerning the payment of creditors and the dispersal of funds. He was aware that the corporation had unpaid tax liabilities, yet other creditors were paid instead of the Department. The Department’s determination must, therefore, be upheld.

Recommendation

For the foregoing reasons, it is recommended that the Notice of Penalty Liability be upheld.

Linda Olivero  
Administrative Law Judge

Enter: January 15, 2004